INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 479

EMANUEL STAVROS HOUVARDAS, PETITIONER

v.

I. F. WIXON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 24-28) is reported at 169 F. 2d 980.

JURISDICTION

The judgment of the Court of Appeals was entered September 28, 1948 (R. 29). The petition for a writ of certiorari was filed December 27, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether an alien who has twice been sentenced to imprisonment for more than one year for crimes

involving moral turpitude may be deported before he has exhausted recourse to the state pardon laws.

STATUTE INVOLVED

Section 19(a) of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended (8 U. S. C. 155(a)), provides in pertinent part:

> Sec. 19(a) * * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, * * *.

STATEMENT

On July 10, 1947, petitioner filed in the District Court for the Northern District of California a petition for a writ of habeas corpus (R. 2-12) challenging the legality of his detention by respondent pursuant to an order of deportation issued March 18, 1946. Petitioner alleged that in March or April, 1912, he was admitted to this country from Greece for permanent residence (R. 2), and that since that time he has resided continuously in California (R.

3); that in February 1939, in the Superior Court of the State of California for the County of Los Angeles, he was convicted on two counts of an information charging forgery of a fictitious name and was sentenced on each count to imprisonment in the state prison "for the term prescribed by law,"[1] the sentences to run concurrently; that execution of this sentence was suspended and he was placed on probation for a period of five years, subject to the conditions that he pay a fine of $200 and serve the first ten months of his probation in the county jail (R. 3-4; Pet. 8); that on April 14, 1942, in the Superior Court of the State of California for the county of Fresno, he was sentenced on his plea of guilty to an information charging oral sex perversion to imprisonment in the state prison "until legally discharged" (R. 4; see Pet. 8 and § 288a, Cal. Penal Code);[2] that on April 28, 1942, the Superior Court for the County of Los Angeles revoked his probation in the first case and directed execution of the sentence, to run concurrently with the sentence imposed in the Fresno County Superior Court (R. 5); that on March 22, 1944, the State Board of Prison Terms and Paroles, California State Prison, San Quentin, California, fixed his term of imprisonment at "10 yrs. & 10 Yrs. & 10 Yrs. CC." from the date of his original

---

[1] This offense is punishable by imprisonment in the state prison for not less than one nor more than fourteen years, or by imprisonment in the county jail for not more than one year (§ 473, Cal. Penal Code).

[2] This offense is punishable by imprisonment for not exceeding fifteen years (§ 288a, Cal. Penal Code).

commitment, April 15, 1942, with credits for good behavior as provided by law;[3] and that he was released on parole January 23, 1945, the parole to expire January 23, 1948 (R. 6-7). Petitioner further alleged that he was still under the supervision of the Parole Officer of the State of California, and that under California law he was not entitled to apply for a pardon until three years after his release from imprisonment, or January 23, 1948 (R. 8-9).[4] Relying on the provision of Section 19 (a) of the Immigration Act of 1917 exempting from deportation aliens who have been pardoned (*supra*, p. 2), petitioner asserted that the immigration authorities acted beyond their authority in directing his deportation before he had an opportunity to apply for a pardon (R. 9-10).

An order to show cause issued (R. 13), and respondent filed a return in which he relied upon the warrant of deportation dated March 18, 1946, and the record of the deportation proceedings (R. 14). On November 4, 1947, the order to show cause was discharged and the petition denied (R. 15), and on September 28, 1948, the order of the district

---

[3] The California courts do not fix the term of imprisonment (§ 1168, Cal. Penal Code); such term is fixed by the Board of Prison Terms and Paroles (§ 3020, Cal. Penal Code).

[4] Sec. 4852.06 of the California Penal Code provides:

"No such petition [for a pardon] shall be filed until and unless the petitioner has continuously resided, after leaving prison, in the county in which it is filed for a period of not less than three years immediately preceding the date of filing the petition * * *."

court was affirmed by the Court of Appeals for the Ninth Circuit (R. 29).

ARGUMENT

Petitioner contends that although he had not been pardoned at the time he was ordered deported and did not, therefore, come within the literal terms of the statutory exemption, it would be contrary to the meaning, purpose and intent of the statute and would therefore constitute a denial of due process of law to deport him before he has had an opportunity to comply with the state law requirements for obtaining a pardon (Pet. 4-5). He argues that notwithstanding the plain language of the statute, Congress meant to exempt from deportation not only those twice-convicted and sentenced aliens who actually had been pardoned, but also those who might at some future time be eligible for a pardon (Pet. 14-15). In effect, he claims the statutory exemption applies to those who have not yet been denied a pardon. We think this contention is patently without merit. The absurd results which would follow such a construction of the statute are obvious. No alien, otherwise subject thereto, would be deportable under the statutory provision in question until his application for a pardon had been submitted to and denied by the appropriate state authority. It could even be urged, under petitioner's construction, that denial of a pardon by one state governor is not conclusive because a pardon might still be obtained from his

successor in office. Thus deportation could be resisted indefinitely.[5]

As pointed out by the court below (R. 26-27), the plain language of the statute is consistent with, and clearly reflects, the true Congressional intent. While there is nothing bearing directly on the present issue in the legislative history of the 1917 Act, the House Committee on Immigration and Naturalization, reporting favorably on S. 5094[6] which became the Act of March 4, 1929, 45 Stat. 1551, 8 U. S. C. 180b, stated:

> In the case of prisoners released on parole under convictions by State courts, it was the practice of the department until recently to take the prisoner into custody immediately on his parole if deportable for any reason. Objections were made by one of the States to this practice, on the ground that it was an infringement on the right of the State to retain custody of the prisoner during the period he is out on parole. The Solicitor of the Department of Labor recently advised the Secretary of Labor that the statute did not authorize the practice of the department, and accord-

[5] In this case, as the court below observed (R. 26), the hands of the Immigration and Naturalization Service would be tied for at least three years by the residence requirement, and, we might add, possibly for a considerably longer period by virtue of the provisions of Section 4852.03, Cal. Penal Code, permitting the Judicial Council to fix a rehabilitation period depending on the severity of the sentence imposed and whether the felon has been convicted of multiple crimes, as well as the provision in Section 4852.16, Cal. Penal Code, that a recommendation in writing from a majority of the judges of the Supreme Court is a prerequisite to the pardoning of a twice-convicted felon.

[6] See H. Rep. 2418, 70th Cong., 2d sess., p. 8.

> ingly it has been discontinued so that under the present law the alien is not deported until the end of the term for which sentenced or until he is unconditionally released from confinement. Your committee is convinced that the law should be made clear that the alien is deportable immediately upon his release from confinement. If he belongs to a deportable class he should be deported even though it may not be against the public policy of the State, under whose laws he has been convicted, that he should be allowed to go at large on parole. The authority of Congress in relation to the deportation of aliens is supreme and the law or practice of a State cannot and should not allow an alien to remain in this country for a moment longer than permitted by act of the National Legislature, which alone is charged with the duty and responsibility of ridding the country of undesirable aliens. Accordingly, section 5 of the bill [7] provides that the alien may be deported immediately upon his release on parole.

If, as this report plainly indicates, it was the intent of Congress not to defer deportation during the parole period, it would be most illogical and "a rather complete example of judicial legislation" (see R. 26) to infer a contrary intent with regard

---

[7] Now Section 3 of the Act of March 4, 1929, *supra*, which provides:

"An alien sentenced to imprisonment shall not be deported under any provision of law until after the termination of the imprisonment. For the purposes of this section the imprisonment shall be considered as terminated upon the release of the alien from confinement, whether or not he is subject to rearrest or further confinement in respect of the same offense."

to the more indefinite period within which a pardon might be secured.[8]

Petitioner also contends (Pet. 18-20) that the Commissioner of Immigration recognized the correctness of petitioner's interpretation of the statute when he granted a stay of deportation for thirty days upon being informed that petitioner was making application for a pardon. We think it is clear, however, that the Commissioner's action merely reflected a willingness to afford a reasonable time for petitioner to obtain a pardon or for the state authorities to effect a pardon (see Pet. 18),[9] although the Commissioner was under no obligation to do so.[10] Petitioner, therefore, was granted some-

---

[8] There is thus no substance in petitioner's argument (Pet. 16-17) that his deportation now would be a denial of due process of law because Section 19(a) of the Immigration Act guarantees him the right to exhaust all possibilities of obtaining a state pardon. This argument is based on petitioner's interpretation of the law, and, as we have shown, that construction is not justified by the wording of the statute, by reason and logic, or by the legislative history of related provisions.

[9] The California law heretofore cited which permits application for a pardon following release from imprisonment and three years residence in the county was enacted in 1943 as "an additional, but not exclusive, procedure for * * * application for pardon". Sec. 4852.19, Cal. Penal Code. It did not affect the Governor's general authority to grant pardons (Sec. 4800, Cal. Penal Code) or the right of the State Board of Prison Directors and the Board of Prison Terms and Paroles to recommend pardons in deserving cases (Sec. 4801, Cal. Penal Code).

[10] See *United States* v. *Bromberg*, 61 F. Supp. 1021 (W. D. Pa.), wherein, on August 9, 1945, the alien, who was at liberty on parole after serving his minimum sentence for murder, was held to be deportable, even though under Pennsylvania law he was automatically entitled to a full pardon at the expiration of his maximum sentence on December 5, 1948. Before

thing to which he was not entitled as of right. His present attempt to attribute to the Commissioner's action the persuasive effect usually accorded a long followed administrative application of an ambiguous or doubtful statute is frivolous.[11]

---

he was actually deported the Governor of Pennsylvania commuted his maximum sentence to expire December 15, 1945, by virtue of which the same court held he had been pardoned and was not deportable. *United States* v. *Garfinkel*, 69 F. Supp. 846 (W. D. Pa.). There was no comparable action by the State of California in the instant case, nor any indication that the State objects to the proceedings to deport petitioner (see R. 28). In fact, petitioner admits (Pet. 9) that he was advised in September 1946, approximately six months after the order for his deportation was issued, that the Governor would not consider an application for a pardon except in accordance with the provisions of the 1943 statute referred to in footnote 9, *supra*. It should also be pointed out that the situation has changed since this proceeding was instituted in the district court. More than three years have elapsed since petitioner was released from imprisonment and he says (Pet. 10, fn. 3) that he has invoked the provisions of the 1943 statute. We are not advised of the present status of that proceeding.

[11] Petitioner is a twice convicted and sentenced alien within the meaning of Section 19(a) of the Immigration Act of 1917 as construed by this Court in *Fong Haw Tan* v. *Phelan*, 333 U. S. 6. He is a "repeater"—he committed a crime involving moral turpitude and was convicted and sentenced, and three years later he was again convicted and sentenced in another court for another crime of that nature. While the first sentence did not go into execution until after his second conviction and sentence and was then ordered to be served concurrently with the second sentence, still he comes within the clear intendment of Congress to deport recidivists. 333 U. S. at 9-10.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General,
ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
Attorneys.

FEBRUARY 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 932143 999